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No. 06-1006

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IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Higher Education Act ("HEA") mandates that an educational institution is ineligible to submit any requests for Title IV student loan and grant funds without first executing an agreement with the Secretary of Education, the Program Participation Agreement ("PPA"), promising to comply with the HEA incentive compensation ban. *See* 20 U.S.C. §1094(a)(20). The HEA incentive compensation ban prohibits schools from compensating recruiters based upon the number of students they enroll. *Id.* Each PPA expressly incorporates the HEA statutory language conditioning a school's "initial and continuing" eligibility to receive Title IV funds on compliance with the HEA specific statutory requirements, including the HEA statutory incentive compensation ban. In short, no school may request or receive any student loan or grant funds without first promising in the PPA to comply with the incentive compensation ban 34 C.F.R. 668.14(b)(22)(i).

The question presented in this case is whether an institution's knowingly false promises to comply with the HEA incentive compensation ban in the mandatory PPAs are actionable under the False Claims Act where those false statements cause the Government to grant the institution's subsequent requests for Title IV student education funds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents submit this Statement:

The Respondents, Julie Albertson and Mary Hendow, individuals, reside in the State of California and were employed by the Petitioner, University of Phoenix.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Mary Hendow and Julie Albertson respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of The False Claims Act quoted in the petition, this case involves The Higher Education Act. Title 20 U.S.C. § 1094 provides, in relevant part:

§ 1094. Program participation agreements

(a) Required for programs of assistance; contents

In order to be an eligible institution . . ., an institution . . . shall . . . enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

[. . .]

(20) The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance . . . . .

STATEMENT

Petitioner presents no "compelling reason" for this Court to grant its petition for writ of certiorari. *See* Sup. Ct. R. 10. The decision below does not conflict with any decision by this Court or any court of appeals. The lower court expressly approved the only lower court decision squarely addressing the issues presented in this case. *United States ex rel Main v.*

Oakland City University, 426 F.3d 914, *reh. den.* (7th Cir. 2005), *cert den.* (April 17, 2006) ("*Main*")(upholding the False Claims Act promissory fraud claim based on nearly identical allegations of violating the Higher Education Act incentive compensation ban). Pet. App.11a -13a.

The allegations, in short, are these schools lie to access government funds. The FCA makes liable anyone who "knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). Relators allege UOP knowingly makes false statements of compliance with the Higher Education Act ("HEA") incentive compensation ban causing the Government to pay the school's Title IV funding requests. As the lower court recognized, an "axiomatic fit" exists between these complaint allegations and the FCA statute imposing liability on the use of a false statement to access federal funds. Pet. App. 2a.

There is no circuit conflict regarding the narrow lower court decision. The lower court *agree*d with other circuits that the false statement must be material to payment by the Government on a claim. The lower court *agreed* with other circuits that, for a promissory fraud claim, the complaint must allege facts showing that the promise was false when made. The lower court "course of conduct" language does not address the implied false certification theory (the lower court expressly declined to address this theory) but rather affirms promissory fraud precedent of this Court and other circuits.

Nor does the decision threaten financial ruin to law-abiding institutions for unknowing mistakes unrelated to government payment on a claim. Rather, the lower court emphasized the false statement must be knowing (as opposed to an unintentional mistake) and "material to the government's decision to pay out moneys to the claimant." Pet. App at 9a. Furthermore, Petitioner selected the wrong vehicle for this "the sky is falling" rhetoric. The HEA incentive compensation ban

is anything but obscure, set forth in the HEA funding statute, the implementing regulations, and the multiple PPAs executed by Petitioner. Pet. App. 15a-16a. The complaint alleges UOP not only knows of the statutory ban, but also brags that it "creates 'smoke and mirrors'" so UOP can "fly under the radar," while executing agreements with the Government promising to comply with the ban. Pet. App.3a-5a, 14a; Resp. App. 3a-6a.

Given the lack of any conflict among the circuits on the issues presented, and the interlocutory nature of the decision below, review by this Court is not warranted. As in *Main*, the petition for a writ of certiorari should be denied.

1. In Title IV of The Higher Education Act of 1965 ("HEA"), Pub. L. No. 89-329, 79 Stat.1219, Congress established various student loan and grant programs, including the Federal Pell Grant Program ("Pell"), the Federal Family Education Loan Program ("FFELP"), and the Federal Direct Loan Program ("FDLP"). Each program requires compliance with specific conditions as a prerequisite to obtaining federal funds. Thus, to become eligible to receive Title IV funds, or to have its students receive funds, under these programs, a school must first enter into a Program Participation Agreement ("PPA") with DOE which "shall condition the initial and continuing eligibility of the school to participate in a program upon compliance with" specific requirements. 20 U.S.C. § 1094(a). See also 34 C.F.R. § 668.14.

The statutory requirement at issue in this case, set forth in the HEA funding statute and replicated in the PPA, is that schools "will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any person or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. 1094(a)(20). Thus, by statutory command, the initial and continuing eligibility of schools to obtain Title IV funding depends on a requirement that those schools

not pay certain types of commissions. Known commonly as the "incentive compensation ban," this statutory mandate is echoed in a regulation specifying the requirements to which schools must expressly agree to adhere in PPAs. *See* 34 C.F.R. 668.14(b)(22)(i).

Based upon evidence of shocking abuses by proprietary schools using the Student Financial Assistance Program, Congress in 1992 enacted the incentive compensation ban, to curb the risk that recruiters will "sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans." Pet. App. 2a. During congressional hearings, Congress determined, "One of the most widely abused areas of those observed during the Subcommittee's investigation lies in admissions and recruitment practices." *Abuses in Federal Student Aid Programs*, 102 S. Rep. 58 (1991) ("Report"). The Subcommittee found proprietary schools victimized their students:

> Fraud and abuse in the GSLP have had perhaps the most profound and disastrous effect on the intended beneficiaries of the Federal student aid, the students. The Subcommittee heard testimony that unscrupulous and dishonest school operators victimize students, leaving them with huge debts and little or no education.

Id.

The congressional investigation noted the differences between colleges and universities, on the one hand, and proprietary trade schools, on the other, lead to such abuses:

> For example, colleges and universities do not employ commissioned sales representatives, while proprietary schools commonly use such personnel in their marketing efforts . . .

Id. (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of student[s] for a given period"); H.R. Rep. No. 102-447, at 10, *reprinted in* 1992 U.S.C.C.A.N. 334, 343 (noting that the "new provisions include prohibiting the use of commissioned sales persons and recruiters").

After a school becomes eligible to receive Title IV funds by entering into a PPA, the school then submits requests for grant funds on behalf of its students directly to the DOE. Under loan programs, the school and students jointly submit requests to private lenders for loans that are then guaranteed by state agencies and are, in turn, insured by the DOE and paid in the event of a default. No matter how a claim is ultimately submitted to the Government, however, the disbursement of federal funds is contingent upon the school executing mandatory statements of compliance with the HEA incentive compensation ban before requests for payment are considered. Such statements thus cause the submission of all subsequent claims for payment under any of these programs.

2. This case involves allegations under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, that the Petitioner, the University of Phoenix ("UOP"), knowingly makes "false statements" by promising to comply with the HEA incentive compensation ban in multiple executed agreements with the DOE, to become eligible (and *remain* eligible) to receive Title IV funds, that these statements were false when made, and that the false statements caused the DOE to pay subsequently submitted claims for Title IV funds. The *qui tam* relators, Respondents Mary Hendow and Julie Albertson (former UOP enrollment counselors), allege UOP's knowing submissions of false PPAs to become eligible to receive Title IV funds are false claims, and cause the submission of false claims, to the Government, in violation of 31 U.S.C. § 3729(a)(2).

Relators allege UOP knowingly violates the statutory ban on incentive compensation by basing enrollment counselor

salary on enrollments and awarding trips and prizes to enrollment contest winners. Pet. App. 3a. Relator Albertson alleges that her salary increased by more than $50,000 upon reaching a specific target number of students to recruit. Pet. App. 3a. Relators allege UOP "urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to atte ıd the university." Pet. App. 3a. This was precisely the harm leading Congress to enact the HEA incentive compensation ban.

Relators also allege considerable fraud by UOP to mask its violation of the incentive compensation ban. Relators allege "UOP senior management openly brag to UOP employees about duping the federal government regarding the UOP compensation scheme." Resp. App. 3a. Relators allege these senior officials "boast that they create 'smoke and mirrors' so that UOP can 'fly under the radar' of the United States Department of Education regarding its illegal compensation scheme." Resp. App. 3a-6a. Relators furthermore assert the UOP corporate head of enrollment openly brags: "It's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see." Pet. App. 4a. To deceive the DOE, relators allege UOP creates two separate employment files for its enrollment counselors – one *"real"* file containing performance reviews based on improper quantitative factors, and one *"fake"* file containing performance reviews based on legitimate qualitative factors. Relators allege the fake file is the only file shown to the DOE. Relators allege a series of UOP policy changes deliberately designed to obscure counselors are compensated on a per-student basis. Pet. App. 4a.

Once relators came forward to the Government, the DOE commenced a program review of UOP policies and procedures regarding recruiter compensation. After conducting site visits, gathering and analyzing compensation documents, and interviewing enrollment directors, managers and sixty counselors,

the DOE, in 2004, issued a "Program Review" confirming the relators' allegations that "UOP is in direct violation of Sec. 487(a)(20) of the Higher Education Act" (the HEA incentive compensation ban). Resp. App. 9a-14a.

Among other things, the DOE found "UOP reinforces to recruiters that UOP evaluates and *pays them solely on the basis of how many students they enroll*." Resp. App. 12a (emphasis added). The DOE reported UOP creates a "corporate culture" that "flaunts the Department's regulations and the prohibition against incentive compensation based on enrollments." Resp. App. 13a. The DOE reported UOP "systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection." Resp. App. 14a. The DOE investigation confirmed relators' allegations that UOP maintains separate books to evade detection. Resp. App. 10a. The DOE also reported "UOP systematically established terminology and procedures to hide the fact that UOP pays distinct and significant financial incentives solely based on recruiters' success in securing enrollments." Resp. App. 13a.

The DOE found recruiters are "pressured to enroll students who are not qualified." Resp. App 11a. Directly linking the illegal practices to the student harm Congress sought to address in enacting the HEA incentive compensation ban, the DOE reported UOP "provides substantial incentives to its staff to recruit unqualified students and students who cannot benefit from the training offered." Resp. App. 14a.

In light of these DOE findings, UOP executed a settlement agreement to pay the DOE $9.8 million, the largest resolution ever of a DOE program review. That agreement expressly *does not* release UOP for liability under the False Claims Act.

4. In the False Claims Act district court action, UOP moved to dismiss the relators' complaint on the ground the relators failed to state a claim under either a false certification

or a promissory fraud theory of liability. On May 20, 2004, the district court dismissed relators' complaint with prejudice under Fed. R. Civ. P. 12(b)(6). The court rejected relators' claim under the "false certification" theory because the Higher Education Act "only requires that [the University] enter into an agreement, and does not require a certification." Pet. App. 5a. And, the court rejected relators' claim under the "promissory fraud" theory, because they did not "identif[y] any certification which is a prerequisite for [the University] to receive federal funds." Pet. App. 5a.

5. The court of appeals reversed. Finding the "relators have raised allegations that the University of Phoenix knowingly made false statements, and caused false statements to be made, that resulted in the payment by the federal Department of Education of hundreds of millions of dollars," the court concluded there was an "axiomatic fit between the operative statute and the allegations made." Pet. App. 2a. After addressing the elements necessary to state a claim under both a false certification and a promissory fraud theory of FCA liability, *id.* 5a-12a, the court held relators stated an actionable claim under both theories, *id.* 13a-19a.[1]

a. The court of appeals first summarized the prerequisites for liability under a false certification theory. Among other things, the court emphasized the need for "a *false* claim, rather than a mere unintentional violation." Pet. App. 8a (emphasis in the original). The court also stressed that the defendant must have knowledge of the claim's falsity. *Ibid.* (noting prior precedents making "clear that a palpably false statement, known to be a lie when it is made, is required for a party to be found liable under the False Claims Act"). In discussing the false

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[1] Although the United States declined to intervene and take over this case in district court, the Government filed an amicus brief in the court of appeals, arguing that the district court erred in dismissing the relators' claims. Pet. App. 5a (noting the participation of the Department of Justice as amicus).

statements imposing FCA liability under the false certification theory, the court explained that, contrary to the district court's understanding, the lie did not have to be labeled a "certification." The court stated that while the liability theory is called "false certification," it could "just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding theory, but that is not as succinct." Pet. App. 9a. As the lower court pointed out, the FCA imposes liability based upon a "false statement" as opposed to a "certification." Pet. App. 9a.

In addition to a false claim and the defendant's knowledge of its falsity, the court of appeals held "the false statement or course of conduct must be material to the government's decision to pay out moneys to the claimant." Pet. App. 9a. Citing its prior decision in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996), and endorsing decisions by other circuits holding that "government funding must be 'conditioned' upon certifications of compliance," *ibid.*, the court again emphasized "there is no special significance to the term 'certification' in determining materiality; the question is merely whether the false certification – or assertion, or statement – was relevant to the government's decision to confer a benefit," *id.* at 10a. Finally, the court affirmed that, for FCA liability, "it is necessary that it involve an actual *claim*, which is to say, a call on the government fisc." *Id.* at 10a.[2]

The court of appeals next examined the "promissory fraud" or "fraud in the inducement" theory of liability. Pet. App. 10a-13a. Under that theory, the court explained, "liability will attach to each claim submitted to the Government under a

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[2] In reciting the elements of liability for an express false certification claim, the court of appeals expressly *declined* to address the question of liability under an implied false certification theory, because it was "beyond dispute" that University of Phoenix "signed the written Program Participation Agreement, thus making an express statement of compliance." Pet App.9a-10a n.1.

contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." *Id.* at 11a. Noting that "[t]he Seventh Circuit recently adopted a version of the promissory fraud theory in a case almost identical to this one," the court expressly adopted the analysis and holding of that case. *Id.* at 11a-12a (citing *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1785 (2006)).

Summarizing the express false certification and promissory fraud liability theories, the lower court concluded "the essential elements of False Claims Act liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." Pet. App. 13a.

b. Applying these principles, the court of appeals concluded the relators alleged facts satisfying each of the four elements necessary for FCA liability. Pet. App. 13a-19a.

The court held the relators alleged false statements by UOP in its Program Participation Agreements promising compliance with the statutory ban on paying incentive compensation to recruiters, that UOP repeatedly violated those promises, and that UOP "did so knowingly, and with the specific intent to deceive the government." Pet. App. 13a-14a. In so holding, the court specifically rejected UOP's argument that allowing the claims in this case to proceed exposed universities to enormous liabilities "for innocent regulatory violations." *Id.* at 14a. The court reiterated that "innocent or unintentional violations do not lead to False Claims Act liability." *Ibid.*

The court of appeals also held that violations of the incentive compensation ban are "material" to the Government's payment decisions because compliance with that requirement is clearly a prerequisite to the receipt of *any* federal funding under the relevant programs. Pet. App. 14a-19a. The court explained that a school's eligibility for Title IV funds — "and thus, the

funding that is associated with such eligibility — is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban." Pet. App. 15a (emphasis in the original). The court cited the HEA funding statute, 20 U.S.C. § 1094(a), the HEA implementing regulation, 34 C.F.R. § 668.14(a) (1), and the PPA language, stressing that all three "demonstrate that compliance with the incentive compensation ban is a necessary condition of continued eligibility and participation" in Title VI funding programs. *Id.* 15a-16a. "The statute, regulation, and agreement here all explicitly condition participation and payment on compliance with, among other things, the precise requirement that relators allege that the University knowingly disregarded." *Id.* 16a.

The court of appeals also rejected UOP's argument that the incentive compensation ban "is merely a condition of *participation*, not a condition of *payment*," noting, "[I]n this case, that is a distinction without a difference." *Id.*16a. The court dismissed the notion that the false statements necessary for program participation were unrelated to funding decisions:

> These conditions are also "prerequisites," and "the *sine qua non*" of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid.

Id at 17a.

Finally, the court of appeals held relators adequately alleged that UOP "submits false claims in a number of ways – either by submitting requests for Pell Grant funds directly to DOE, resulting in a direct transfer of the funds into a University account, or by submitting requests to private lenders for government-insured loans." Pet. App. 19a. As the court summarized, "[a]ll that matters is whether the false statement or course of conduct causes the government to 'pay out money or to forfeit moneys due.'" *Id.* at 19a (citation omitted).

REASONS FOR DENYING THE PETITION

The decision below is correct and does not conflict with any decision by this Court or any court of appeals. The only other court of appeals that squarely addressed the issues presented in this case issued a decision fully consistent with the decision below. In *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1785 (2006), the Seventh Circuit Court of Appeals reversed the dismissal of a *qui tam* relator's action against a proprietary educational institution alleging identical violations of the incentive compensation ban and the False Claims Act, and this Court recently denied the defendant's petition for certiorari in that case. The same result is warranted here.

The court of appeals' decision reflects the common sense proposition that the False Claims Act prohibits lying to obtain government benefits in all its forms and not merely statements that can be characterized as false "certifications" regarding compliance with prerequisites for the receipt of government benefits. The decision also tracks the plain language of the FCA, which applies broadly to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. 3729(a)(2).

Petitioner summarily asserts the court of appeals' decision "disregards the statute's plain language," Pet. 9, but Petitioner offers virtually no textual analysis of the False Claims Act to support this contention. Nor can any such analysis be made because the lower court tracks the statutory language by requiring that the false statement be the "'the *sine qua non*' of federal funding." Pet. App.17a. Instead, Petitioner primarily contends the decision below conflicts with decisions by other courts of appeals. However, to manufacture any plausible claims of conflict with precedent in other circuits, Petitioner grossly mischaracterizes both the decisions in other cases and what the court of appeals in this case actually held.

As explained more fully below, Petitioner's argument that the decision below conflicts with decisions holding that a false statement must relate to "conditions of payment," Pet. 10-18, is plainly wrong, because the court of appeals found that the incentive compensation ban is *both* a condition of program participation *and* a condition of payment. Pet. App. 17a (noting that, if UOP had not agreed to comply with that condition, "it would not have gotten paid").

Likewise, Petitioner's contention that the decision below conflicts with decisions holding an express false statement is a prerequisite to a false certification claim, Pet. 19-22, is without merit, because the court of appeals in this case found that UOP made *express* false statements and thus declined to address the question of liability under an implied false certification theory. Pet. App. 9a-10a n.1.

Finally, Petitioner's argument the decision below conflicts with decisions imposing a "strict pleading threshold on promissory fraud claims," Pet. 22, lacks merit because there is no special pleading requirement for promissory fraud claims, and the court of appeals in this case properly concluded Respondents satisfied the pleading requirements for a promissory fraud claim by alleging that UOP's promises of compliance with the incentive compensation ban were knowingly false when made. Pet. App. 14a.

In the end, Petitioner's arguments for further review boil down to the bald assertion that the court of appeals' decision opens the door to enormous potential liabilities for educational institutions and businesses that knowingly defraud the Government. As an initial matter, this argument is entirely speculative, as the decision below does not actually impose liability on anyone, but rather merely permits a claim to proceed on the merits beyond the motion to dismiss stage. More importantly, though, the court of appeals' decision does not, as Petitioner suggests, threaten FCA liability for simple noncompliance with "obscure" regulatory conditions. To the contrary, as the court

of appeals took great care to emphasize, an educational institution may be liable under the False Claims Act only where (1) it made *knowingly* false statements to the Government (*e.g.*, lies, rather than mere negligent missteps) regarding compliance with (2) conditions necessary for the receipt of government benefits (*e.g.*, requirements that are *material* to the Government's payment decisions). There is nothing novel or unusual about that holding. It does not pose an inordinate chilling effect on any business attempting in good faith to comply with statutory funding requirements in government programs. In short, Petitioner's policy arguments provide no compelling basis for further review by this Court.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly held Respondents stated a valid claim for relief under the False Claims Act by alleging UOP repeatedly lied about its compliance with the statutory incentive compensation ban in order to obtain – and *maintain* – its eligibility to receive Title IV funds. Relying upon the plain language of the FCA, which prohibits the knowing use of "a false record or statement to get a false or fraudulent claim paid or approved," 31 U.S.C. § 3729(a) (2), the court declared there is an "axiomatic fit" between the operative statute and the allegations in the complaint. Pet. App. 2a. Thus, the court properly concluded the Respondents satisfied the essential pleading requirements under the express false certification and promissory fraud theories of liability. Pet. App. 13a-19a.

As the court of appeals explained, a university's eligibility to obtain Title IV funds 'is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban." Pet. App. 15a (emphasis in original). The federal funding statute, 20 U.S.C. § 1094(a) & (a) (20), federal regulations, 34 C.F.R. § 668.14(a) (1), and mandatory Program Participation Agreements "all explicitly condition participation *and payment* on compliance with, among other things, the precise requirement that relators allege that the University

knowingly disregarded." Pet. App. 16a (emphasis added). As a result, the court had no difficulty concluding that compliance with the incentive compensation ban was material to the Government's funding decisions.

Moreover, given Respondents' specific allegations regarding UOP's repeated and knowing violations of the incentive compensation ban, and its knowingly false promises to comply with that requirement, the court held Respondents "have properly alleged (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out moneys due." Pet. App. 19a; *see also*, Pet. App. 3a-5a, 14a.

The court of appeals' holding, and its analysis of the essential elements necessary for liability under the False Claims Act, are consistent not only with the plain language of the FCA, but also with numerous decisions by this Court imposing liability in similar circumstances. See, *e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (holding electrical contractors who rigged bids on municipal contracts funded by federal government liable for causing municipalities to submit false claims). Indeed, this Court has stated that the FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

Likewise, the legislative history of the 1986 amendments to the False Claims Act confirms that the statute applies "even though the services are provided as claimed if, for example, the claimant *is ineligible to participate in the program.*" S. Rep. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

Petitioner makes no serious argument that the court of appeals' decision is contrary to the plain language of the FCA

or any decision by this Court.[3] Instead, Petitioner contends primarily that the court's decision conflicts with decisions by other courts of appeals. In order to make those arguments, however, Petitioner grossly mischaracterizes both the court of appeals' decision in this case and governing precedent in other circuits. Based on its misunderstandings of these decisions, Petitioner contends the decision below threatens enormous new liabilities under the FCA. As discussed below, these claims lack merit.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRECEDENTIAL DECISIONS BY ANY COURT OF APPEALS

The court of appeals' essential holding – that UOP's knowingly false promises to comply with a statutory prerequisite for receiving Title IV funds are actionable under the FCA – *does not* conflict with the precedential decisions of any other courts of appeals. To the contrary, in *Main*, the Seventh Circuit Court of Appeals recently reversed the dismissal of virtually identical claims under the FCA alleging systematic violations of the incentive compensation ban by a for-profit educational institution. The lower court herein expressly adopted the Seventh Circuit's reasoning in *Main*, see Pet. App. 12a. Petitioner makes no real effort to distinguish *Main* from this case.

As in *Main*, this complaint alleges that UOP promised to comply with the HEA incentive compensation ban, that those promises of compliance were core requirements for the receipt

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[3] Although Petitioner cites *United States v. McNinch*, 356 U.S. 595, 599 (1958), for the proposition Congress did not intend for the False Claims Act "to reach every kind of fraud practiced on the Government," *see* Pet. 2, 8, 24, Petitioner offers no analysis of the *McNinch* decision, and nowhere attempts to reconcile that decision with this Court's more recent declarations that the False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Neifert-White Co.*, 390 U.S. at 232. Petitioner thus presents no plausible argument that the decision below conflicts with any decision of this Court.

of *any* Title IV funds, and that those promises were false when made. Pet. App. 3a-5a, 14a. Even though the false promises were not expressly reiterated in claims for payment submitted directly to the Government, the Seventh Circuit had no difficulty concluding they fell within the FCA language imposing liability on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a) (2). As the Seventh Circuit explained:

> The University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn't true. *Main*, 426 F.3d at 916.

Thus, despite Petitioner's arguments that the decision below conflicts with other appellate decisions, the only other court of appeals squarely addressing the claims and legal issues presented in this case rendered a decision entirely consistent with the decision below. This Court recently denied the petition for certiorari filed in *Main*. The same result is warranted here.

A. The Decision Below Does Not Conflict With Decisions of Other Courts of Appeals Distinguishing Between Conditions of Eligibility and Conditions of Payment Because The Incentive Compensation Ban Is Both a Condition of Eligibility And a Condition of Payment

Petitioner's principal argument is that the court of appeals' decision in this case conflicts with decisions from other circuits

"holding that fraud in connection with a condition of payment is a prerequisite to a false certification claim." Pet. 10.

That argument is wholly without merit for one simple reason: the court of appeals in this case held that compliance with the incentive compensation ban *is* a condition of payment. As the court explained, the promises to comply set forth in the Program Participation Agreement are "'the *sine qua non*' of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid." Pet. App. 17a.

Because the court of appeals concluded that the requirement at issue in this case is a condition of *payment,* the distinction some courts have drawn between conditions of payment and conditions of eligibility is *not implicated* in this case. Indeed, the court of appeals in this case cited and *agreed with* many of the same cases that Petitioner now contends "conflict" with the decision below. Compare Pet. App. 6a (citing, *inter alia*, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 (4th Cir. 1999); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697-700 (2d Cir. 2001)), *with* Pet. 12 (citing *Harrison*); Pet. 14 (citing *Mikes*).

Likewise, the court of appeals endorsed its precedent holding that FCA liability attaches only where there is fraud in connection with "a prerequisite to obtaining a government benefit." Pet. App. 7a (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir.1996)).

Thus, the decision below *does not* endorse any expansive new theory of FCA liability, and *does not* conflict with decisions drawing a distinction between conditions of payment and conditions of eligibility for participation in a program.

The decisions Petitioner cites simply do not stand for the proposition that a condition of program eligibility can never support a claim under the False Claims Act. Rather, consistent with the holding in this case, those decisions recognize that the

violation of a condition of eligibility can render a claim false when it also qualifies as a condition of payment. Thus, in *Harrision*, the Fourth Circuit held that the defendant's failure to disclose a conflict of interest, which was a "prerequisite for subcontract approval" – that is, a condition of eligibility for the contract – "fits squarely into the false certification cases." *Harrison*, 176 F.3d at 794.

Likewise, in *United States ex rel. Thompson v. Columbia/ HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997), the Fifth Circuit remanded the case to the district court for a determination as to whether the certifications in the Medicare cost reports were not only conditions of participation but also prerequisites to payment and, on remand, the district court held that the Government "relied on the certifications in determining the issues of payment and retention of payment *as well as* continued eligibility for participation in the Medicare program." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1020 (S.D. Tex. 1998) (emphasis added). Thus, both *Harrison* and *Thompson* recognize that a condition of eligibility can also be a condition of payment that serves as the predicate for an FCA claim.[4]

Ultimately, Petitioner's desperate attempt to manufacture a "conflict" between the decision below and decisions in other courts of appeals rests on Petitioner's insistence that compliance with the incentive compensation ban "is a threshold

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[4] Although the Second Circuit Court of Appeals in *Mikes* refused to find liability based on a particular condition of Medicare program eligibility, the court did not purport to hold that all conditions of eligibility were outside the scope of the FCA, but merely that the specific requirement at issue in that case did not constitute a prerequisite to payment. *Mikes*, 274 F.3d at 701-02. As the court of appeals in this case explained, the Second Circuit's decision in *Mikes* was motivated in large part by considerations unique to the Medicare context. Pet. App. 18a. Nothing in *Mikes* is inconsistent with the Ninth Circuit Court of Appeals' holding that the HEA incentive compensation ban is both a condition of eligibility and a condition of payment.

condition of eligibility to participate in the Title IV program, rather than a condition of payment." Pet. 11. On this point, however, there is *no circuit split* – there is *unanimity*.

As Petitioner concedes, see Pet. 11, in *Main* the Seventh Circuit also concluded that the incentive compensation ban *is* a condition of payment, noting "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Main*, 426 F.3d at 916. The lower court here echoed that view, observing "in this case" the distinction between conditions of participation and conditions of payment "is a distinction without a difference." Pet. App. 16a.

The court of appeals correctly held that compliance with the incentive compensation ban is both a condition of payment and of program participation. As the court explained in rejecting Petitioner's proposed distinction between promises of *future* compliance and statements that an institution *has* complied with certain conditions, all the required statements of compliance in the Program Participation Agreements are conditions of payment under the HEA funding scheme, because, if UOP had not made them, "it would not have gotten paid." Pet. App. 17a. Moreover, the court recognized,"[i]f such promises were not conditions of payment, the University would be virtually unfettered in its ability to receive funds from the government while flouting the law." *Id.*

Petitioner nowhere even acknowledges the court's holding that the incentive compensation ban is not merely a condition of participation, but is also a condition of payment. Nor does Petitioner explain why that conclusion is wrong, much less why that issue – the proper characterization of a condition on federal funding in a specific statute – is sufficiently important to warrant this Court's attention.

Indeed, the only support Petitioner offers for its view that the incentive compensation ban is "merely" a condition of participation is a district court decision affirmed in an

unpublished Fifth Circuit memorandum opinion. Pet. 13 (citing *United States ex rel. Graves v. ITT Educational Servs, Inc.*, 284 F.Supp. 2d 487, (S.D.Tex. 2003), *aff'd*, 111 F. App'x 296 (5thCir. 2004)). But the Fifth Circuit did not undertake any analysis of this question in *Graves*, and its *per curiam* opinion affirming the district court makes clear that the "opinion should not be published and is *not precedent* except under the limited circumstances set forth in 5th Cir. R. 47.5.4."

In light of the Seventh Circuit's published decision in *Main* rejecting similar efforts to discount the incentive compensation ban as "merely" a condition of program eligibility, Petitioner cannot plausibly contend there is any real circuit split on the question whether the incentive compensation ban can properly be viewed as a condition of payment.

In sum, because the lower court held the incentive compensation ban is a condition of payment *as well as* a condition of program eligibility, this decision plainly does not "conflict" with any decisions purporting to distinguish between conditions of payment and conditions of participation. This decision is fully consistent with the Seventh Circuit's decision in *Main*, and it does not permit any new or expansive form of FCA liability.

B. The Decision Below Does Not Conflict With Decisions Of Other Courts Requiring An Explicit False Statement, Because Petitioner Made Explicit False Statements Concerning Compliance With The Incentive Compensation Ban In Its Program Participation Agreements.

Likewise, Petitioner's argument that the decision below conflicts with decisions from other circuits "holding that a false representation is a prerequisite to a false certification claim," Pet. 19, is without merit. Here again, Petitioner's claim of conflict rests on a fundamental misunderstanding of what the court below actually held. Although Petitioner suggests the

court of appeals in this case recognized an expansive theory of liability under an *implied* certification theory, the court below *specifically* held it was *not* addressing "the viability of this theory, because it is beyond dispute that UOP signed written Program Participation Agreements, thus making an express statement of compliance." Pet. App. 9a, n.1. In light of the court's holding that UOP made *express* false statements in its Program Participation Agreements, no credible argument can be made that the decision below expands liability under an implied certification theory.

To manufacture some claim of conflict with decisions in other circuits, Petitioner focuses on language in the decision below stating that the first element of FCA liability is "a false statement or fraudulent course of conduct." Pet. App. 13a. According to Petitioner, the court of appeals' reference to a "fraudulent course of conduct" jettisons the requirement of an express false statement for false certification liability and is therefore at odds with decisions in other circuits. Pet. 12.

But the language Petitioner cites *does no such thing.* To the contrary, as noted above, the court of appeals repeatedly emphasized UOP made *express* false statements and it therefore was unnecessary to consider the scope of potential liability for a "fraudulent course of conduct" under an implied certification theory. Pet. App. 9a-10a n.1

Read in proper context, the language Petitioner cites is best understood as a description of the first element of a *promissory fraud* theory of liability rather than a false certification theory. Pet. App. 13a (reciting the elements necessary "under either the false certification theory or the promissory fraud theory"). That understanding is fully consistent with decisions in other circuits explaining that a "fraudulent course of conduct" is the first element of a promissory fraud claim. See *e.g.*, *Harrison v. Westinghouse Savannah River Co*, 176 F.3d at 786-787. As the court of appeals in this case made clear, its references to a "fraudulent course of conduct" do not in any way expand

liability under a false certification theory but instead relate solely to the promissory fraud theory of liability: "In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent *course of conduct*, made with scienter." Pet. App.13a (emphasis added).

Because a "fraudulent course of conduct" is plainly a sufficient basis for FCA liability under a promissory fraud theory, the court of appeals' use of that language in describing that theory was entirely proper and does not conflict with any decisions by this Court or any other court of appeals. See *Hess*, 317 U.S. at 542 (recognizing promissory fraud theory of liability based on collusive bidding to obtain government contracts); *Harrison*, 176 F.3d at 787-88 (recognizing promissory fraud theory of liability based on submission of false information to the Government to obtain contract).

C. The Decision Below Does Not Conflict With Court Decisions Requiring Prompt Failure To Follow PromisesBecause Petitioner Falsely Represented Compliance With The Incentive Compensation Ban, Knowing It Violated That Ban, And Intending To Continue To Do So In The Future.

Nor is there any merit to Petitioner's contention that the decision below conflicts with decisions from other circuits "imposing a strict pleading requirement on promissory fraud claims." Pet. 22. To the contrary, the court of appeals' analysis of promissory fraud is entirely consistent with the Seventh Circuit's decision in *Main*, recognizing the viability of promissory fraud claims virtually identical to the ones in this case. Like the Seventh Circuit, the court of appeals in this case explained that the critical element of promissory fraud claims is that "the promise must be false when made." Pet. App. 12a (quoting *Hopper*, 91 F.3d at 1267). Compare *Main*, 426 F.3d at 917 (explaining that "failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not

to keep is fraud"). The court of appeals held Respondents satisfied this requirement by alleging Petitioner repeatedly and knowingly made false promises to comply with the incentive compensation ban while not intending to honor those promises. Pet. App. 14a.

Petitioner nowhere acknowledges the detailed allegations of knowing fraud in Respondent's complaint. Pet. App. 3a-5a, 14a; Resp. App. 1a-8a. Instead, Petitioner simply asserts the court of appeals established a "relaxed standard for pleading promissory fraud" that "virtually guarantees that a claim will survive a motion to dismiss and that the defendant will face significant pressure to settle even the most dubious of promissory fraud claims." Pet. 24.

Here again, however, Petitioner's contention the court of appeals recognized an expansive new theory of FCA liability rests on misleading assertions about the court's holding and shocking misstatements regarding the import of decisions in other circuits. For example, Petitioner quotes the D.C. Circuit's observation in *United States ex rel Bettis v. Odebrrecht Contractors of Cal., Inc.*, 393 F.3d 1321 (D.C. Cir. 2005), that "there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." Pet. 23 (quoting *Bettis*, 393 F.3d at 1329-30). But *Bettis* was decided on a motion for summary judgment and thus concerned the *evidence* necessary to support a promissory fraud claim, not (as here) the adequacy of pleadings required to survive a threshold motion to dismiss.

The only other decision Petitioner cites to support its argument that other circuits have imposed a "strict pleading threshold on promissory fraud claims," Pet. 22, is *United States ex rel Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375 (5th Cir. 2003), and Petitioner's reliance on that decision is equally flawed. Although *Willard* (unlike *Bettis*) was decided on a motion to dismiss, the Fifth Circuit dismissed the one-sentence allegation of fraud in that case for failure to satisfy

the specific requirements for pleading fraud set forth in Fed. R. Civ. P. 9(b). *Willard*, 336 F.3d at 386. But the heightened pleading requirements of Rule 9(b) are not at issue in this appeal, and, Respondents' detailed fact allegations in this case contrast markedly with the conclusory, one-sentence fact allegation that the Fifth Circuit found inadequate in *Willard*. See Pet. App. 13a-14a (summarizing relator's allegations); Resp. App. 1a-8a (alleging that, while UOP executes its PPAs, senior executives boast to employees about creating "smoke and mirrors" so UOP may "fly under the radar," deceiving the DOE by re-titling documents, maintaining two sets of books, and other deceptive practices).

In short, Petitioner's contention that the decision below conflicts with decisions in other circuits imposing strict pleading requirements on promissory fraud claims is wholly without merit. No further review by this Court is warranted to address this issue or any of the other claims of "conflict" with other circuits that Petitioner seeks to manufacture.

III. THE COURT OF APPEALS' DECISION DOES NOT THREATEN FINANCIAL RUIN FROM UNINTENTIONAL VIOLATIONS OF OBSCURE REGULATIONS, BECAUSE ONLY KNOWING VIOLATION OF LAWS MATERIAL TO GOVERNMENT PAYMENT ON A CLAIM IMPOSE FALSE CLAIMS ACT LIABILITY

In addition to alleged circuit conflicts, a secondary theme permeating the petition is innuendo that the court of appeals' decision threatens ruinous financial liability for substantially law-abiding entities contracting with the Government or participating in federal funding programs. Petitioner argues that review by this Court is warranted to prevent "potentially devastating FCA liability based upon noncompliance with *any* of the extensive regulations that govern participation in the federal financial aid program.") Pet. 16 (emphasis added).

Contrary to Petitioner's arguments, however, the specter of massive FCA liability based on unwitting violations of program requirements is entirely illusory, and is not supported by the record. As the court of appeals took great care to explain, liability under the FCA *may not* be predicated on immaterial regulatory missteps or merely negligent noncompliance with applicable requirements. Pet. App. 7a (reaffirming prior circuit precedent holding that "[m]ere regulatory violations do not give rise to a viable FCA action"). The decision below *does not* support imposing FCA liability upon a government contractor over its commission of a minor regulatory infraction. To the contrary, the court below made abundantly clear that FCA liability arises *only* from (1) *knowingly* false statements regarding requirements that are (2) *material* prerequisites for the receipt of government benefits. Pet. App. 13a.

The lower court discussed at length the "central importance" of scienter for a False Claim Act claim, citing to its precedent requiring a false statement made "with knowledge of the falsity and with intent to deceive." Pet. App. 8a. Stated another way, the lower court emphasized the necessity of a "palpably false statement, known to be a lie when it is made." Pet. App. 8a.

Secondly, the lower court affirmed its own precedent and that of other circuits mandating that the false statement must be "material to the government's decision to pay out moneys to the claimant." Pet. App. 9a-10a. The lower court affirmed its precedent that a central focus is "(1) whether the false statement is the cause of the Government's providing the benefit, and (2) whether any relation exists between the subject matter of the false statement and the even triggering Government's [sic] loss." Pet. App. 9a, citing to *Hopper v. Anton, supra*, 91 F.3d at 1266.

In sum, the opinion below does not apply to regulatory violations unrelated to government payment decisions. There

must be an *intent to deceive* the Government *on a material issue determining the Government's payment* on a claim.

The case allegations furthermore make this case the wrong vehicle for Petitioner's slippery-slope claim that this decision expands FCA liability to encompass mere regulatory violations unrelated to Government payment. The condition at issue, the HEA incentive compensation ban, is explicitly stated not only in the HEA funding statute itself, but also in the implementing regulations and multiple executed contracts with the DOE. Relators' powerful complaint allegations, detailing UOP's conscious deception of the Government, are a quantum leap beyond mere inadvertent violations. Relators allege that while UOP executes agreements with the Government promising to honor the funding statute's incentive compensation ban, UOP boasts about creating "smoke and mirrors" to "fly under the radar" of the Government regarding UOP's illegal compensation system. Relators furthermore allege UOP maintains two sets of books, deceptively re-titles documents, and uses code terms in a blatant and knowing effort to hide its illegal conduct. Pet. App. 3a-5a, 15a; Resp. App. 1a-8a.

A government review confirmed relators' allegations that UOP "systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection." Resp. App. 14a.

The Seventh Circuit dismissed similar policy arguments in *Main*, see 426 F.3d at 917 (rejecting defendant's argument that the relator's approach "would treat any violation of federal regulations in a funding program as actionable fraud"). The court of appeals herein likewise properly dismissed Petitioner's contention that the court's holding "opens [UOP] up to greater liability for innocent regulatory violations." Pet. App. 14a. See also *Main*, 426 F.3d at 917 ("Tripping up on a regulatory complexity does not entail a knowingly false representation").

In sum, there is no basis for Petitioner's arguments that the decision below opens the floodgates to substantial new (and unfair) liabilities under the FCA for violations of "obscure" or technical regulatory requirements.

As the HEA funding statute makes clear, and the court of appeals in this case properly held, the incentive compensation ban has a direct nexus to government payment decisions. In light of substantial evidence demonstrating that payment of incentive compensation to recruiters fundamentally undermines federal student grant and lending programs, (see e.g., *Abuses in Federal Student Aid Programs*, 102 S. Rep. 58 (1991), Congress specifically prohibited the payment of Title IV funds to any institution that engaged in that practice and also required express promises from institutions not to pay such compensation in order to maintain their eligibility for those funds. 20 U.S.C. 1094(a) & (a) (20).

Given the obvious importance and centrality of this condition on the receipt of government benefits, Petitioner's "sky-is-falling" rhetoric regarding the possibility of FCA liability based on "obscure" regulatory requirements is utterly misplaced.[5]

IV. THE COURT OF APPEALS' DECISION IS INTERLOCUTORY

A final reason for denying the petition for certiorari in this case is that the decision below is interlocutory. See *Brother-*

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[5] Petitioner's reliance upon an internal Department of Education memo, to argue that violations of the HEA incentive compensation ban do not cause the Government monetary loss or necessarily prevent program participation, is disingenuous. The Court of Appeals for the Seventh Circuit previously disposed of this same "back-office" memo argument. *Main*, 426 F.3d at 917. The memo is merely non-binding commentary, disbursed without public notice, and comment that does not lawfully supercede the HEA statute (20 U.S.C. § 1094(a) (20)), the HEA regulations (34 C.F.R. § 668.14(b)(22)(i)), and the multiple executed PPAs – *all* of which the Ninth Circuit found *expressly* to condition government payment of student financial aid funds on UOP's compliance with the incentive compensation ban. Pet. App. 15a-16a.

hood of Locomotive Firemen v. Bangor & Aroostook RR., 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."). Absent extraordinary circumstances, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). Because petitioner has not identified any extraordinary circumstances warranting a departure from this rule, review of the interlocutory ruling by this Court of Appeals is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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March 23, 2007

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* MARY HENDOW and JULIE ALBERTSON,, Plaintiffs,

vs.

UNIVERSITY OF PHOENIX and DOES 1-500, Inclusive, Defendants.

Case No. CIV. S-03-0457 GEB DAD

SECOND AMENDED COMPLAINT FOR DAMAGES, WITH DEMAND FOR JURY TRIAL

Causes of Action:

1. Knowingly False Statements to Get a False or Fraudulent Claim Paid or Approved, in Violation of the False Claims Act, 31 U.S.C. § 3729(a)(1).

2. Knowingly False Records or Statements to Get a False or Fraudulent Claim Paid or Approved, in Violation of the False Claims Act, 31 U.S.C. § 3729(a)(2).

1. (a) This is an action to recover damages and civil penalties on behalf of the United States of America arising out of false claims approved and presented by Defendants to obtain over one-half billion dollars annually from the United States Department of Education pursuant to the Higher Education Act, Title IV ("HEA"), from at least January 1, 1997, continually through the present. (b) Defendant University of Phoenix ("UOP") is the largest recipient of HEA federal student financial aid funds from the United States Department of Education. (c) In requesting and receiving at least one-half billion dollars annually, Defendants falsely represent every year that they are in compliance with HEA's prohibition against using incentive payments for recruiters for recruiting activities, which is a core prerequisite to eligibility for the Title IV funds. (d) Defendants had, and continue to have, actual knowledge that they are not adhering to the HEA ban, that their representations of adherence were and are false, and that they therefore were and are submitting false or fraudulent representations of compliance. (e) Alternatively, Defendants act and acted with deliberate indifference and/or reckless disregard as to the truth or falsity of the claims. (f) Relators assert causes of action under the False Claims Act for submission of a knowingly false or fraudulent claims for payment or approval, and knowingly false records or statements to get a false or fraudulent claim paid or approved, in violation of 31 U.S.C. § 3729(a)(1) and (2).

[. . . .]

17. (a) UOP, in flagrant violation of the Title IV ban, compensates enrollment counselors, including Relators, based directly upon enrollment activities. (b) UOP publishes charts (called matrix) setting forth the enrollment activity numbers necessary for a performance rating (such as "exceeds expectations" or "meets expectations"). (c) Along with the matrix charts, UOP publishes its salary schedules, with a salary range corresponding to each performance rating. (d) An enrollment counselor thus knows his or her salary range, based on her enrollment activities level. (e) UOP furthermore "stack ranks" counselors based upon their number of enrollments. (f) The top ranking counselors are among the highest paid

counselors, receiving the highest salary as well as incentive trips, awards and gifts based upon their enrollment numbers.

18. (a) To boost its enrollment numbers, UOP Corporate Enrollment urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university. (b) This process leads to student disqualification from UOP (or additional financial costs for the students to take additional classes) and financial disaster for the students forced to repay the federal loans while UOP collects the federal funds for these fraudulently "enrolled" students.

19. (a) *UOP is fully aware of the illegality of its compensation scheme.* (b) UOP senior management openly brag to UOP employees about duping the federal government regarding the UOP compensation scheme. (c) They boast that they create "smoke and mirrors" so that UOP can "fly under the radar" of the United States Department of Education regarding its illegal compensation scheme.

20. (a) UOP disguises its illegal compensation scheme in many ways. (b) UOP retitles documents to mask the illegal compensation scheme. (c) For example, until recently, UOP titled its monthly reports to enrollment counselors verifying student enrollments "*Commissioned Starts*"("starts" refers to student enrollments). (d) UOP creates its "stack rankings" from these reports. (e) Once the federal government began fining institutions for violating the HEA incentive compensation ban, UOP continued its compensation scheme and simply renamed the reports, removing the "commissioned starts" from the document title.

21. (a) To further mask its illegal compensation scheme, UOP maintains separate review files on the enrollment counselors. (b) One file contains legitimate review criteria produced to the federal government, and the other secret file containing the actual, illegal quantitative enrollment review criteria.

22. UOP also developed a glossary of "code words" used in documents to further disguise that compensation is based solely on enrollment activities.

B. UOP's False Certifications of Compliance to the Government, Required by Law for Eligibility to Receive the Federal Funds

[. . . .]

29. (a) UOP, in requesting and receiving its over one-half billion dollars a year in Title IV funds, every year falsely certifies to the DOE compliance with the incentive compensation ban in the Agreement it submits annually to the DOE. (b) UOP falsely induces the Government to approve and/or pay out the Title IV funds, based on its false promises to comply with the incentive compensation ban. (c) The promises when made are false. (d) Upon making its promises and certifications, UOP knowingly engages in the illegal incentive compensation schemes detailed below.

30. (a) UOP every year also falsely asserts compliance with the incentive compensation ban in "management assertion letters" written by UOP management for an annual compliance audit. (b) UOP must submit to the United States Government this annual compliance audit performed by an independent certified public accountant. (c) Participation in the Title IV program is conditioned upon UOP submitting these audits certifying compliance with the HEA incentive compensation ban. (d) UOP is ineligible to submit any claims for HEA funds unless it submits this annual audit.

31. (a) As a required part of the audit, UOP certifies in a management assertion letter that it had "not paid to any persons or entities any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments . . . for each year at issue." (b) UOP knows this certification is false because UOP intentionally violates the incentive compensation ban.

C. UOP's Claims for the Federal Government Funds

32. (a) Upon entering the Program Participation Agreement with the United States Secretary of Education, UOP is eligible to request the Title IV funds from the United States Secretary of Education (for Pell Grant funds) or from third party lenders (for government-insured loans).

33. (a) For Pell Grant funds, UOP submits a request for those funds directly to the Secretary of the United States Department of Education. (b) The request for funds is not a student application but a request prepared and transmitted by UOP to the Secretary of the United States Department of Education, stating the requested amount of funds. (c) The United States Department of Education transfers the Pell Grant funds electronically directly into a UOP account. (d) Upon receiving the Pell Grant funds, UOP credits various UOP students for tuition paid. (e) A UOP student does not request or receive a dime of the Pell Grant funds.

34. (a) UOP's claims for the Pell Grant funds are fraudulent. (b) When UOP requests, receives and retains the Pell Grant funds, UOP knows it is ineligible for those funds because of its intentional violations of the Higher Education Act incentive compensation ban. (c) UOP knows that compliance with the Higher Education Act funding statute incentive compensation restriction is a core prerequisite for an institution's eligibility to request and receive Title IV funds.

35. (a) For government-insured loans, including the FFELP, UOP submits the request for those funds directly to a private lender. (b) The UOP request for government-insured loan funds, arranged, managed and prepared by UOP, includes a student application that *contains an express certification by UOP that the student is an eligible student under the Title IV program.* (c) The claim for government-insured loans *must* include this UOP certification. (d) UOP knows that this claim for funds is false because UOP knows its students are *not* eligible under the Title IV program due to UOP's violations of the HEA incentive compensation ban. (e) *Only* students at eligible Title IV schools may receive credit for Title IV

government-insured loan funds disbursed by private lenders to educational institutions. (f) UOP's fraudulent violations of the HEA incentive compensation ban make it an ineligible educational institution to request and disburse Title IV funds, and thus its students are ineligible under the Title IV program. (g) The lender, typically a bank, transfers the government-insured loan funds directly into a UOP account. (h) Upon receiving the government-insured loan funds, UOP credits various UOP students for tuition paid.

36. (a) UOP's claims for the government-insured loan funds are fraudulent. (b) When UOP requests, receives and retains the government-insured loan funds, UOP knows it is ineligible for those funds because of its intentional violations of the Higher Education Act incentive compensation ban. (c) UOP knows that compliance with the Higher Education Act funding statute incentive compensation restriction is a core prerequisite for an institution's eligibility to request and receive Title IV funds.

[. . . .]

H. Defendant's "Smoke and Mirrors" Cover-up of Its Fraudulent Practices

58. (a) UOP knowingly and intentionally deceives the Department of Education regarding its violations of the HEA ban on incentive compensation for recruiters. (b) As Bill Brebaugh, head of UOP Corporate Enrollment openly brags, UOP masks its illegal compensation scheme through "smoke and mirrors" so that UOP can "fly under the radar" of the Department of Education. (c) Mr. Brebaugh repeatedly emphasizes to the enrollment counselors: "It's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see."

59. UOP's deceptive tactics include the following:

(a) Separate Enrollment Counselor Personnel Files. (i) UOP maintains two separate files on each enrollment counselor. (ii) Corporate Human Resources maintains the

"official" file, while Corporate Enrollment and the local campuses maintain the other "unofficial" file upon which compensation is based. (iii) The Corporate Human Resources file contains performance reviews showing legitimate qualitative review criteria allegedly used to assess performance. (iv) These factors include "job related skills," "working relationships," "customer service," and "supervisory skills." (v) UOP does not review these factors with its counselor nor rate performance based upon these factors. (vi) Corporate Enrollment (the department tracking enrollment activities) and the local campuses maintain the performance reviews actually used to assess performance and determine compensation, based upon illegal quantitative enrollment activities. (vii) UOP reviews enrollment counselors on a daily, weekly, monthly, quarterly and annual basis. (viii) At these reviews, only quantitative enrollment activities are discussed. (ix) There is no discussion or review of the qualitative factors allegedly impacting performance evaluation. (x) These reviews, establishing counselors' compensation, are based entirely upon the counselors' quantitative enrollment activities (enrollment numbers, appointments (numbers and outcome), outgoing telephone calls, and leads (generated and outcome). (xi) Counselors' quantitative performance of each activity corresponds to a performance rating (such as exceeds or meets expectation) which in turn corresponds to a salary range and merit increase level.

(b) Matrix and Salary Levels Separated. (i) Until recently, UOP wrote the salary range corresponding to the quantitative enrollment activity rating directly on the enrollment activities charts ("matrix"). (ii) Once the Department of Education began fining institutions for compensating based upon enrollment activities, UOP stopped publishing the salary ranges directly on the Matrix. (iii) UOP now publishes the corresponding salary ranges in a separate document.

(c) The Enrollment Activity "Code" Terms on Documents. (i) UOP renamed the category concerning student "enrollments" on its various enrollment counselor evaluation forms to mask that compensation is directly tied to enrollment numbers and activities. (ii) On the matrix, "application" is the

code term for "enrollment." (iii) On the UOP weekly and monthly matrix evaluations of each counselor, "Student Info Card" or "level one card" is the code term for an "enrollment." (iv) UOP refers to its stack rankings as "stack rankings" only in their internal e-mails. The stack rankings are officially titled "Gross New Enrollments"

(d) The Renaming of Enrollment Compensation Documents. (i) UOP publishes monthly reports verifying enrollment counselors enrollment numbers. (ii) Until recently, those reports were titled "Approval of Deferred *Commissionable* Starts" (emphasis added). (iii) A "start" is an enrolled student – a student who has agreed to a payment plan and is attending classes (two nights attended for an undergraduate; or completion of the first three-week course for a graduate student). (iv) After the federal government began prosecuting violations of the HEA recruitment ban, UOP still published the monthly reports, but renamed them "Student and Financial Status" reports or "Enrollments by Rep."

(e) UOP Salary Policy Changes: Salaries No Longer Decrease. (i) Until 1999, UOP enrollment counselors' salaries rose or fell every six months, depending upon the performance category corresponding to their enrollment activities for that evaluation period. (ii) In 1999, to decrease attention to the salary variances, UOP decided that salaries could only rise or fall annually. (iii) Fall 2000, to further mask that its compensation scheme is tied directly to enrollment activity, UOP changed its enrollment counselor salary policy so that salaries could no longer decrease.

(f) The Use of Enrollment Code Terminology. (i) Corporate Enrollment sets enrollment goals through hidden messages. (ii) For example, a fifty-year old Director set a Sperling trip enrollment goal of 50 enrollments in 2000 by announcing, "you know how old I am." (iii) Or, the enrollment goal of 52 for a particular contest was set by Corporate Enrollment by stating "you know how many states there are."

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APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION
Student Financial Assistance
Schools Channel/Case Management & Oversight
Case Management Team,
Southwest-San Francisco Team
50 United Nations Plaza, Suite 268
San Francisco, California 94102-4987
Voice (415) 556-4295 FAX (415) 437-8206

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• "The matrix talks about customer service, communications, judgment; but when you talk to your manager, your manager tells you that it is the enrollments that count."

• "The amount of money was dependent on how many students I enrolled. Other factors, such as communication, are not mentioned."

• One manager told a recruiter during an evaluation: "The qualitative has to align with whatever is on the first page (the quantitative numbers). . . . We have got to make the qualitative portion of your review match where you fit on your numbers."

Some recruiters indicated further that it was widely known that supervisors would simply adjust the "qualitative factors" to match the numbers. Recruiters overwhelmingly confirmed that the number of enrollments was the "bottom line." Recruiters stated that even though the number of enrollments was the actual basis of their salary, management was always careful not to put this in writing due to awareness that the Department prohibited incentive compensation based on enrollments. Recruiters who asked their managers to put the enrollment requirements in writing were refused.

One director, who had also been an enrollment manager, and was hired in the early 1990s, recalls that when she was hired, the matrix included the number of enrollments. With the old matrix, evaluations were very straightforward. The number of enrollments established the salary. In the late 1990s, however, the Corporate Director of Enrollment issued a directive to managers explaining that UOP could no longer directly put the number of enrollments on the matrix because to compensate recruiters based only on the number of students enrolled was illegal. As a result, UOP introduced "qualitative" factors into the matrix. In addition, UOP began maintaining two files on recruiters; one was the "activity" file, kept at the local campus; the second was the Human Resources/official personnel file, kept in headquarters, in Phoenix. The "official" human resources file contains only qualitative ratings. The quantitative data is kept in the activity file and forms the basis for salary evaluations.

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5.3.1 Pressure to Enroll Unqualified Students

Recruiters frequently mentioned their concern for student customers for whom UOP was not a good educational option, such as customers who, because of their family and financial situation, could not reasonably expect to complete a degree program at UOP and would be better served by other alternatives, such as a community college. UOP managers chastise recruiters who suggest anything other than UOP. UOP makes it very clear that recruiters are to do whatever it takes to get the student to enroll. Some managers told recruiters that if a student drops after the first five-week course, it should not be their concern, because by then, the recruiter and the manager will have received the enrollment credit.

Recruiters at both On Ground and On Line stated that they are pressured by management to enroll students who are not qualified. They indicated that managers chastise them for failing to pressure students into enrolling or staying in their first class, in spite of the lack of financial resources. UOP makes it clear that recruiters are expected to find a way to "overcome objections," e.g., if the problem was insufficient funds, encourage Title IV funding. If the objection was insufficient Title IV funds, pressure the student to seek a private loan.

Some recruiters who were also UOP students expressed concern that UOP kept students in class even though they were unable to perform. Some mentioned that UOP pressured instructors to pass all students, regardless of performance.

5.3.2 Focus on Obtaining Credit for Enrollment, Not on Completing Education

From its Monthly Commissionable Sales Reports, to its Admission Counselor Policy Guide, to its repeated reminders from managers, UOP reinforces to recruiters that UOP evaluates and pays them solely on the basis of how many students they enroll. Recruiters recounted of how they are careful to follow students until they met the criteria that resulted in credit to the recruiter's enrollment account for purposes of salary; specifically, that the student must attend three nights of the first five-week course of a bachelors' program or, for graduate students, attend two nights of a graduate class and be scheduled to attend a second class. After the student has met these criteria, the managers do not want the recruiters to spend time with a student. UOP requires them to pursue new enrollments, not follow those who have already completed one course.

Many recruiters thought that this system of selling the student and then dropping them once the enrollment credit is earned, underscores UOP's lack of concern for its students. Those who had been at UOP for several years all stressed that at one time, UOP had been more student and education oriented. After its Wall Street debut, however, UOP eliminated its focus on students and became increasingly aggressive in its obsession with numbers: new enrollments, meeting Wall Street expectations, maintaining profit margin. This is especially acute in the case of UOP On Line, ...

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5.4 Conclusion: UOP Violated Incentive Compensation Prohibitions And Breached Its Fiduciary Duty

5.4.1 Deceptive Practices to Mislead Department

The sales philosophy and practice at UOP is designed around evasion and relies upon euphemisms to avoid detection by the Department. UOP systemically established terminology and procedures to hide the fact that UOP pays distinct and significant financial incentives solely based on recruiters' success in securing enrollments. . . .

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At the On Line Campus, UOP generally posts large banners ranking the recruiters by the number of enrollments cleared. UOP removed these banners shortly before the arrival of the reviewers for interviews of On Line personnel. The UOP spreadsheets posted on recruiters' computer desktops that showed the salary/enrollment "goals" were also removed the day of the reviewers' arrival at the On Line Campus.

The actions of UOP and the system it has established cultivates and maintains a corporate culture in defiance of UOP's fiduciary duty. UOP has created an environment that pits the strong motivation of individual gain against its fiduciary duty to the Department. It is one that flaunts the Department's regulations and the prohibition against incentive compensation based on enrollments.

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Applying this guidance to UOP's system of recruiter salary compensation, we find that UOP:

- hires its recruiters with the promise of lucrative compensation for success in securing enrollments;
- maintains a recruiter evaluation and salary system that provides incentive payments based both directly and indirectly on success in securing enrollments;
- provides substantial incentives to its staff to recruit unqualified students and students who cannot benefit from the training offered;
- systematically and intentionally operates in a duplicitous manner so as to violate the Department's prohibition against incentive compensation while evading detection.

Accordingly, UOP is in direct violation of §487(a)(20) of the Higher Education Act.